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No. 89-66

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1989

JAMES LINDSTROM, ET AL,
PETITIONERS,

v.

EDWIN H. ALLEN, ET AL,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF OF PETITIONERS JAMES LINDSTROM, ET AL.

Timothy R. McGowan
Petitioner
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15 pp

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I REPLY TO RESPONDENTS' REQUEST FOR DISMISSAL

Respondents correctly state that the case is governed by substantive and procedural law of Virginia. The question presented in the Writ of Certiorari is whether the Virginia Supreme Court denied the petitioners' right of Due Process by violating the Rules of the Virginia Supreme Court in granting an appeal from the Circuit Court. Respondents also clearly identify Timothy R. McGowan is the sole petitioner. If his right of Due Process was denied, then the rights of all appellees were denied. If the rights of Mr. McGowan are protected then the rights of all citizens are protected.

The respondents do not deny that Rule 5:11(b) was violated. The Respondents are only heard to cry that this is a insignificant violation of the right of Due Process, and this particular violation effects only a few individuals. Therefore, the writ should be dismissed.

The importance of a writ is not determined by the number of petitioners, but by the fundamental rights in jeopardy.

II REPLY TO RESPONDENTS' STATEMENT OF THE CASE

The suit filed in the Circuit Court of Fairfax County by the Allens requested specific performance on a contract made with the Lindstroms to sell a piece of property to the Allens. This contract was entered into with the assistance and guidance of Max Rush and Anice Southerland, real estate agents for Coldwell Banker Residential Real Estate, Inc.

In the trial court opinion, specific performance was denied the Allens based on the misrepresentation of the real estate agents, and the "unjust and inequitable" manner in which the contract was entered into.

III Enforcement of the Supreme Court of Virginia Rule 5:11 is essential to the Petitioners' Right of Due Process.

The Respondents argue that the transcripts were made a part of the record by the Judge *Pro Tempore* and this should relieve the Respondents of the duties imposed by Rule 5:11 of the Supreme Court of Virginia. Judicial economy would allow that is is unnecessary to object to, or correct deficiencies in transcripts of the proceedings of the Circuit Court if no Petition for Appeal were filed.

Rule 5:10 identifies the contents of the Record on Appeal. Rule 5:10 (a)(7) states that the transcripts are "made a part of the record as provided in Rule 5:11". By violating Rule 5:11, the transcripts were never properly made a part of the record on appeal. Only when a transcript becomes a part of a Petition for Appeal is correctness of the transcript essential. Rule 5:11(b) requires the "counsel for the appellant to notify all other counsel of the date on which the transcript is filed" with the Supreme Court of Virginia.

Rule 5:11(d) allows for objections to the transcript on the grounds of "erroneous or incomplete" transcripts. Where the transcripts were part of the record prior to the Petition for Appeal, as in the instant case, objections must be filed "within 10 days after the notice of appeal has been filed with the clerk of the trial court" *Id.* The rules recognize that at times the transcript will be filed prior to the appeal and places different

requirements in the objection process. No exception, or revised procedure is made for compliance with Rule 5:11(b). The rule is mandatory.

The respondents state incorrectly that Rule 5:11 is non jurisdictional. Rule 5:11 I. GENERAL CONSIDERATION reads:

> **Rule is jurisdictional**. — The provisions of this rule are simple and easily understood, but they are jurisdictional, and failure to comply will result in dismissal, either before or after appeal is awarded. Towler v. Commonwealth, 216 Va 533, 221 S.S.2d 119 (1976).

The respondents state that the Petitioners do not complain about any specific error or omissions from the transcripts. By Rule 5:11(d) of the Supreme Court of Virginia objections must be raised within 10 days of the filing of the Petition for Appeal if the transcripts became a part of the record prior to the petition for appeal. That period expired in August, 1986. Attempts to correct the transcript at this time would be both futile and moot. The correctness of the transcript, and the resolution of errors or omissions are issues governed by the substantive and procedural law of Virginia. The denial of the timely right to review and correct the transcript, and the inclusion of the transcript in the Records on Appeal in violation of the Rules of the Supreme Court of Virginia are the basis of the writ.

It is sufficient to know that the Petitioners were denied the right to review and correct the transcripts, and that the Supreme Court of Virginia relied on these uncorrected transcripts. This sequence of events raises the Question of Due Process.

IV Rule 5:11, Supreme Court of Virginia

The Respondents mislead the Court with the selective use of direct quote and paraphrase of Rule 5:11. For the Court's convenience, the 1986 version of Rule 5:11 is reproduced below. It is the Rule that is applicable to this case. The shading is emphasis added by the Petitioner.

Rule 5:11. Record on Appeal: Transcript or Written Statement.

(a) *Transcript.* — The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment.

(b) Notice. — Counsel for appellant shall promptly notify all other counsel of the date on which the transcript is filed.

(c) *Written Statement.* — In lieu of a transcript, a written statement of facts, testimony, and other incidents of the case, which may include or consist of a portion of the transcript, becomes a part of the record when:

(1) within 55 days after entry of judgment a copy of such statement is filed in the office of the clerk of the trial court. A copy must be mailed or delivered to opposing counsel accompanied by notice that such statement will be presented to the trial judge no earlier than 15 days nor later than 20 days after such filing; and

(2) the statement is signed by the trial judge and filed in the office of the clerk of the trial court. The judge may sign the statement forthwith upon its presentation to him if it is signed by counsel for all parties, but if objection is made to the accuracy

or completeness of the statement, it shall be signed in accordance with subsection (d) of this Rule.

(d) *Objections.* — Any party may object to a transcript or written statement on the ground that it is erroneous or incomplete. Notice of such objection specifying the errors alleged or deficiencies asserted shall be filed with the clerk of the trial court within 15 days after the date of mailing of the notice of filing the transcript (subsection (b) of this Rule) or within 15 days after mailing of the notice of filing the written statement (subsection (c) of this Rule) is filed in the office of the clerk of the trial court or, if the transcript or written statement is filed before the notice of appeal is filed, within 10 days after the notice of appeal has been filed with the clerk of the trial court. Counsel for the objecting party shall give the trial judge prompt notice of the filing of such objections. Within ten days after the notice of appeal has been filed with the clerk of the trial court. Counsel for the objecting party shall give the trial judge prompt notice of the filing of such objections. Within ten days after the notice of objection is filed with the clerk of the trial court, the judge shall:

(1) overrule the objection;
(2) make any corrections that he deems necessary;
(3) include any accurate additions to make the record complete;
(4) certify the manner in which the record is incomplete; and
(5) sign the transcript or written statement.

At any time when the record remains in the office of the clerk of the trial court, the trial judge may, after notice to counsel and hearing, correct the transcript or written statement.

Source. — Rule 5A:8 Cf. Rules 5:9 and 5:11.

Cross references. — For meaning of "filed with the clerk," "filed in the office of the clerk," "opposing counsel" and "counsel for the appellant," see Rule 5:1.

Law Review. — For survey of Virginia law on pleading and practice for the year 1972-1973, see 59 Va. L. Rev. 1559 (1973). For survey of Virginia law on practice and pleading for the year 1974-1975, see 61 Va. L. Rev. 1799 (1975). For survey of Virginia practice and pleading for the year 1975-1976, see 62 Va. L. Rev 1460 (1976). For 1985 survey of Virginia civil procedure and practice, see 19 U. Rich. L. Rev. (1985).

I. General Consideration.
II. Objections.

I. GENERAL CONSIDERATION.

Purpose of rule. — This rule was adopted as part of an overall revision of the rules, to provide a simplified method of making a transcript a part of the record. Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976).

Rule mandatory. — The jurisdictional nature of this rule necessitates compliance with its mandatory requirements. Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976).

Rule is jurisdictional. — The provisions of this rule are simple and easily understood, but they are jurisdictional, and failure to comply therewith will result in dismissal, either before or after appeal is awarded. Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976).

Transcript of a hearing is not a part of record on appeal if is has not been made such under the requirements of this rule. Washington v. Commonwealth, 216 Va. 185, 217 S.E.2d 815 (1975).

Suspension of time requirements of rules to permit prosecution of an appeal. — See Newsom v. Commonwealth, 207 Va. 844, 153 S.E.2d 235, cert. denied, 388 U.S. 918 87 S. Ct. 2136, 18 L. Ed. 2d 1361 (1967).

The record must contain all evidence necessary and material for the appellate court to determine the existence of errors in the trial court transcript. Wansley v. Commonwealth, 205 Va. 419, 137 S.E.2d 870 (1964), cert. denied, 380 U.S. 922. 85 S. Ct. 920, 13 L. Ed. 2d 860 (1965).

Case will be considered on record sent from lower court. — On appeal the case will be considered on the record which is sent from the lower court, and not upon counsel's recollection of what occurred there. Justis v. Young, 202 Va. 631, 119 S.E.2d 255 (1961).

Trial court's decision presumed correct absent evidence in record to contrary. — Where evidence is presented to the chancellor and a jury on an issue out of chancery, and the chancellor, in his decree, does not follow the findings of the jury, and where the evidence on which the decree is based has not been made a part of the record to be considered by the Supreme Court, it is impossible for the Supreme Court to pass on the point that the decree is contrary to the law and the evidence. The decision of the chancellor is presumed to be correct and is binding. Lawrence v. Nelson, 200 Va. 597, 106 S.E.2d 618 (1959).

Appellant has primary responsibility of presenting evidence to Supreme Court. — An appellant who seeks the reversal of a decree on the ground that is is contrary to the law and the evidence has the primary responsibility of presenting to the Supreme Court, as a part of the printed record, the evidence introduced in the lower court, or so much thereof as is necessary and sufficient for the Supreme Court to give full consideration to the assignment of error. Lawrence v. Nelson, 200 Va. 597, 106 S.E.2d 618 (1959).

Evidence may be stated in narrative form. — The use of narrative statement is a proper method of furnishing a record of evidence and incidents of trial for appeal. Houghtaling v. Commonwealth, 209 Va. 309, 163 S.E.2d 560 (1968), cert. denied, 394 U.S. 1021, 89 S. Ct. 1642, 23 L. Ed. 2d 46 (1969).

Where appellant presented to and had certified by the trial court a "narrative of proceedings" instead of having the testimony transcribed, a motion to dismiss was denied. Collins v. Pulaski County, 201 Va. 164, 110 S.E.2d 184 (1959); Valentine v. County of Brunswick, 202 Va. 696, 119 S.E.2d 486 (1961).

Refusal of court to sign or alter narrative statement. — Where trial judge was informed that court reporter would be present to record proceedings and consequently failed to take any notes during trial, the court did not err in refusing to sign plaintiff's narrative statement or in failing to make alterations in, and additions to, the statement in an attempt to render it accurate and then sign it. Woods v. R.D. Hunt & Son, 207 Va. 281, 148 S.E.2d 779 (1966).

Remedies where judge refuses to certify evidence. — While mandamus will lie to compel a judge to certify the evidence when he shall so refuse, it is also error to so refuse, of which any party injured may complain to the Supreme Court,

and for which that Court will reverse the judgment of the court below. Harris v. Woodby, Inc., 203 Va. 946, 128 S.E.2d 278 (1962).

Appeal not dismissed where record otherwise sufficient. — Motion to dismiss the appeal on the ground that defendant did not comply with subsection (c) of this rule in that the judge refused to certify the "Statement of Facts Pursuant to Rule 5:9" was denied where the record was sufficient for the adjudication of the issues presented. City of Richmond v. Randall, 215 Va. 506, 211 S.E.2d 56 (1975).

Applied in State Hwy. Comm'r v. Easley, 215 Va. 197, 207 S.E.2d 870 (1974); Old Dominion Iron & Steel Corp. v. VEPCO, 215 Va. 658, 212 S.E.2d 715 (1975); K-B Corp. v. Gallagher, 218 Va. 381, 237 S.E.2d 183 (1977); Sampson v. Sampson, 221 Va. 896, 275 S.E.2d 597 (1981); Owen v. Shelton, 221 Va. 1051, 277 S.E.2d 189 (1981); Goodstein v. Allen, 222 Va. 1 278 S.E.2d 787 (1981); Burns v. Eby & Walker, Inc., 226 Va. 281, 308 S.E.2d 114 (1983); Roe v. Roe, 228 Va. 722, 324 S.E.2d 691 (1985); Barrett v. Barrett, — Va. App. —, 339 S.E.2d 208 (1986).

II. OBJECTIONS.

This rule does not provide the exclusive procedure for correcting errors. Lamb v. Commonwealth, 222 Va. 161, 279 S.E.2d 389 (1981).

But it provides the preferred procedure that should be used in all cases to correct transcripts. Lamb v. Commonwealth, 222 Va. 161, 279 S.E.2d 389 (1981).

Certification by a judge is a judicial act. When counsel for the respective parties are unable to agree on evidence to be included in the proposed transcript or statement, it is the duty of the judge to settle the conflicting views. In so doing, he may make reasonable additions, deletions, or changes, in order that the record may contain a fair statement of the facts. New Bay Shore Corp. v. Lewis, 193 Va. 400, 69 S.E.2d 320 (1952).

Burden upon complaining party to show error. — The burden of showing that the evidence is incorrect or incomplete is upon the complaining party. New Bay Shore Corp. v. Lewis, 1983 Va. 400, 69 S.E.2d 320 (1952).

And to institute proper proceedings for certification of correct record. — If the record before the Supreme Court is not the correct record, it is the duty of the complaining party to institute proper proceedings for certification of the correct record. The Supreme Court must accept the record as they find it. New Bay Shore Corp. v. Lewis, 1983 Va. 400, 69 S.E.2d 320 (1952).

Remedy where judge unable to determine accuracy of transcript or statement. — If, because of the lapse of time or lack of memory, the judge is unable to determine the accuracy of the transcript or statement, and the case is still under his control, he should order a new trial, so that a proper transcript or statement can be prepared. Harris v. Woodby, Inc., 203 Va. 946, 128 S.E.2d 278 (1962).

Correction after docketing of appeal. — Where a criminal appeal was docketed before an error in the trial transcript was discovered, correction could be made only with leave of the Supreme Court. Lamb v. Commonwealth, 222 Va. 161, 279 S.E.2d 389 (1981).

V THE DECISIONS OF THE VIRGINIA REAL ESTATE BOARD WERE GERMANE TO THE ISSUES BEFORE THE SUPREME COURT OF VIRGINIA AND SHOULD HAVE BEEN TAKEN NOTICE OF.

The Respondents state that the Virginia Supreme Court had before it a complete evidentiary record from the trial court's proceedings. By not complying with Rule 5:11(b) the Respondents ensured that the transcripts were incomplete.

The decisions of the Virginia Real Estate Board were based on a complaint filed by Timothy R. McGowan, the Petitioner, in April 1985. The Virginia Real Estate Board (in 1985, the Virginia Real Estate Commission) has certain rules and procedures mandated by the Virginia Code. The procedures include multiple investigations and inquiries. The rules stipulate that if there is a probable violation of the Real Estate rules and regulations by licensed processionals "a formal hearing" is held. The Commonwealth of Virginia becomes the Complainant at the "formal hearing" to assure a fair and impartial proceeding.

The Commonwealth of Virginia stood as complainant in the formal hearing into allegations of impropriety in the procurement of the contract on which the Allens sought specific performance. On September 7, 1988 the Hearing Officer found that Max Rush and Annie Southerland violated eight Virginia Real Estate Regulations in the procurement of the Allen contract. Both Edwin H. Allen and Timothy R. McGowan were witness in the proceedings. The Hearing Officer's findings became the official findings of the Real Estate Board on January 9, 1989. Until that date, the Hearing Officers findings were not subject to disclosure.

The findings of the Real Estate Board go directly to the issues of misrepresentation, dual agency and the inequitability of the Allen contract in complete support of the findings of the trial court.

Upon being made aware of the final ruling of the Real Estate Board, the Petitioners obtained an official copy of the findings, and filed a Motion to Take Judicial Notice in a timely fashion. These findings were germane to the issues before the Supreme Court of Virginia. The findings should have been considered instead of or in addition to the uncorrected transcripts.

CONCLUSION

For the reasons submitted herein and in the petition for Writ of Certiorari, it is respectfully requested that the petition should be granted.

Dated: August 31, 1989

Respectfully submitted,

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